INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:

Brooks v. *National Labor Relations Board*, 348 U.S. 96 — 6, 8

Houston Chronicle Publishing Co., 130 NLRB 1243, enforcement denied, 300 F. 2d 273 — 7

Local 1545, Carpenters v. *Vincent*, 286 F. 2d 127 — 6

Mar-Jac Poultry Co., 136 NLRB 785 — 4, 6, 7, 8

National Labor Relations Board v. *Marcus Trucking Co.*, 286 F. 2d 583 — 6

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*):

Section 8(a)(1) — 5

Section 8(a)(5) — 3, 5

Section 9(c)(1) — 5

723-780—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1103

COMMERCE COMPANY, d/b/a LAMAR HOTEL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals opinion (Pet. 1a–2a) is reported at 328 F. 2d 600. The Board's decision and order (Pet. 24a–25a; R. 102–103)[1] are reported at 140 NLRB 226. The Board's decision in the underlying representation proceeding (Pet. 5a–9a; R. 39–44) is reported at 137 NLRB 1271.

JURISDICTION

The judgment of the court of appeals (Pet. 1a–2a) was entered on March 3, 1964, and an application for

[1] References designated "R." are to the Transcript of Record printed for the use of the court below and filed with the petition; those designated "B.A." are to the Board's Appendix.

rehearing was denied on March 30, 1964 (Pet. 4a). The decree (Pet. 3a) was entered April 7, 1964. The petition for a writ of certiorari was filed on May 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board could properly extend the vitality of its certification of a union representative for six months beyond the usual twelve-month period upon finding that the employer had declined to bargain during a substantial part of that period.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) are set forth in the petition (Pet. 3–4).

STATEMENT

On September 23, 1960, following a representation election which the Union[1] won (130 to 90), the Board certified it as the exclusive bargaining representative for "[a]ll employees of the Employer at the Lamar Hotel, Houston, Texas, including regular part-time employees, office clerical employees, auditing department employees, but excluding temporary and irregular part-time employees, confidential employees, professional employees, guards, and supervisors as defined in the Act" (R. 27–30).

The Union and the Company proceeded to engage in collective bargaining. A dispute arose with respect

[1] Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

to whether the jobs of 11 employees brought them within the unit described by the Board's certification.[1] The Union sought to bargain about the terms of the contract without first settling this issue, but the Company refused to meet further until the matter had been decided by "agreement" or "authoritative administrative determination" (B.A. 28–34). Thus, a letter from the Company to the Union, dated March 23, 1961, concluded (B.A. 30–31), "Therefore, a meeting with you does not appear in order until our respective obligations, if any, are determined." As a result, on March 28, 1961, the Union filed a charge with the Board alleging that the Company had unlawfully refused to bargain in violation of Section 8(a)(5) of the Act (R. 45–48). At the Regional Director's suggestion, however, the Union withdrew this charge on May 18, 1961, and on the same day filed a motion for clarification of the certified unit and requested a hearing to determine the unit placement of the 11 employees (R. 33–36). On November 6, 1961, the Board issued an Order Directing Supplemental Hearing for the purpose of taking testimony and other evidence as to the employees in dispute (R. 38–39).

[1] These 11 employees had been among the 14 who had voted at the representation election at the insistence of the Company, but whose ballots were challenged and not counted by the Board's representative because their jobs were not included in the unit described by the Board in its Direction of Election (R. 21, 27–28, 35). At the time of the election, the Company had a motion pending before the Board to redetermine the unit by including several job classifications which had been excluded (R. 22–26). The Board granted this motion after the election (R. 29–30), but never passed upon the challenges or counted the ballots because they were not sufficient in number to affect the results of the election.

On November 13, 1961, a decertification petition was filed by an employee, Joe Melton, asserting that the Union no longer represented a majority of the employees in the certified unit (R. 61–64). For purposes of hearing, the Regional Director consolidated the proceeding on the petition with the proceeding on the Union's motion for clarification (R. 36–37).

The consolidated hearing was held on December 5, 1961 (B.A. 1). By that time, one of the 11 employees was no longer working for the Company, and the parties stipulated that 9 others were within the unit described by the Board in its certification (R. 43). On July 12, 1962, the Board issued its decision (Pet. 5a–9a). It clarified the certification by adding to the unit the 9 employees covered by the stipulation, and by finding that Amador, the only employee whose status remained in question, was a supervisor and should be excluded (Pet. 8a–9a). In addition, the Board found that the decertification petition was untimely and ordered it dismissed.

The Board predicated the latter action on its decision in *Mar-Jac Poultry Co.*, 136 NLRB 785, where it had held that it would extend the twelve-month period during which a Board certification is normally immune from challenge for an additional period of time where it appears that, due to action on the employer's part, there was a suspension in bargaining during a substantial portion of the twelve-month period. Finding that approximately six months had elapsed from the filing of the 8(a)(5) charge to the expiration of the certification year, the Board granted the Union "an additional period of six months from

the resumption of negotiations in which to engage in collective bargaining" (Pet. 8a).

On July 14, 1962, the Union sent a letter to the Company, requesting collective bargaining and enclosing two copies of a proposed contract (B.A. 12–13). On July 27, 1962, the Company notified the Union that it was refusing to bargain with it because it believed that the Union had lost its majority and that the Board's dismissal of the decertification petition was erroneous (B.A. 18–19). The Union filed unfair labor practice charges with the Board, which found that the Company's refusal to bargain violated Section 8(a) (5) and (1) of the Act. The Board ordered the Company to cease and desist from the unfair labor practices found, and to bargain collectively with the Union (Pet. 24a–25a, 11a–23a).

The court of appeals enforced the Board's order in full.

ARGUMENT

The court of appeals decision is correct and is not in conflict with the decisions of this Court or those of any other circuit. There is no occasion for further review.

1. Petitioner's basic substantive contention (Pet. 13-15) is that it was not obligated to bargain with the Union because the Board had improperly dismissed the decertification petition, *i.e.*, that the Board lacks discretion to decline to entertain a decertification petition which is filed more than twelve months after the certification has issued. This contention is groundless. Section 9(c)(1) of the Act (Pet. 3) provides that the Board shall proceed on a petition for

a certification or decertification election if it finds "reasonable cause to believe that a question of representation affecting commerce exists." Whether a question of representation exists is left largely to the Board's discretion. In the interest of stability, the Board has formulated certain rules for the exercise of its discretion, including the one-year certification rule approved by the Court in *Brooks* v. *National Labor Relations Board,* 348 U.S. 96. Under that rule, a Board certification, in the absence of extraordinary circumstances, is entitled to respect for at least a year, even if through no fault of the employer the union has meanwhile lost its majority status. The justification for the rule is that it guarantees a union "ample time for carrying out its mandate on behalf of its members," and removes any basis the employer may have for believing "that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time." *Brooks, supra,* at 100. But, just as some circumstances may warrant entertaining a representation petition *before* the certification year is up (see 348 U.S. at 98–99), so others may justify a refusal to entertain such a petition even *after* the certification year has expired. One such circumstance is the execution during the certification year of a collective bargaining agreement extending for a reasonable period beyond the year. See *Local 1545, Carpenters* v. *Vincent,* 286 F. 2d 127, 130–131 (C.A. 2); *National Labor Relations Board* v. *Marcus Trucking Co.,* 286 F. 2d 583, 592–593 (C.A. 2). Another, the Board concluded in *Mar-Jac Poultry,* 136 NLRB 785, *supra,*

is the suspension of bargaining during a substantial portion of the certification year as a consequence of the employer's action.

The *Mar-Jac Poultry* rule is a reasonable exercise of the Board's discretion under the Act. For, where the employer causes negotiations to be suspended, the union, through no fault of its own, loses "a substantial part of the period when Unions are generally at their greatest strength—the 1-year period immediately following the certification"; and "to permit the Employer now to obtain an election would be to allow it to take advantage of its own failure to carry out its statutory obligation, contrary to the very reasons for the establishment of the rule that a certification requires bargaining for at least 1 year" (136 NLRB at 787).

As the court below found, the Board was warranted in applying that rule here. Although, unlike in *Mar-Jac Poultry,* it was not established that the employer conduct which caused the suspension in bargaining within the certification year was unlawful,[4]

[4] In *Mar-Jac Poultry*, a complaint issued on the union's charge that the employer's refusal to bargain within the certification year was violative of Section 8(a)(5) of the Act, and the employer then entered into a settlement agreement in which he agreed to bargain in good faith with the union (136 NLRB at 786). However, the Board, in *Mar-Jac*, indicated that the principle there enunciated was not limited to the precise situation presented but was applicable to "future cases revealing similar inequities". (*id.*, at 787). See also, *Houston Chronicle Publishing Co.*, 130 NLRB 1243, 1245 enforcement denied on other grounds, 300 F. 2d 273 (C.A. 5) (a doubt as to the unit placement of certain employees is not "a license for the abandonment of orderly collective bargaining on *all other points* that may then be open before the parties").

the conduct here nevertheless resulted in depriving the Union of the full bargainng to which it was entitled. After only six months of the certification year had passed, the Company refused to bargain about contract terms until the Union negotiated, or asked the Board to decide, whether 11 named employees were included or excluded from the certified unit. The Union, adopting the course suggested by the Company, instituted proceedings before the Board to clarify the unit; but the certification year had expired before these proceedings could be completed. To permit the Union's representative status to be challenged in these circumstances would, no less than in *Mar-Jac*, deny to it the year of unimpeded bargaining which the *Brooks* rule contemplates, and enable the employer to profit by the delay which his own actions occasioned.

2. Petitioner's contention (Pet. 7–13) that the court below upheld the Board on a ground which the Board did not rely on, and indeed disavowed—*i.e.*, the Company's failure to bargain—misconceives the basis of the Board's decision. Petitioner cites a passage from the decision which does not allude to the failure to bargain, and statements by the hearing officer that the history of bargaining was not "material" (Pet. 10–11). The quoted passage, however, merely summarized the Union's contentions before

the Board. Later, in setting forth the reasons which prompted its action, the Board specifically relied on the prior interruption in the bargaining, stating that, as a result of the unit placement dispute, "bargaining ceased"; that "during the pendency of the * * * 8(a)(5) charge and the Union's Motion for Clarification the parties have not engaged in collective bargaining"; and that during this period of time "the Union has been deprived of its right to unimpeded collective bargaining" (Pet. 7a–8a). Moreover, the hearing officer's statements can be construed as an attempt to preclude litigation, not of the question whether negotiations had in fact been broken off, but of the further question whether such a suspension amounted to a prohibited refusal to bargain on the Company's part. Unfair labor practice issues are not relevant to a representation proceeding, and, as shown (pp. 7–8), the Board was justified in extending the life of the certification without determining whether the Company's refusal to bargain actually amounted to an unfair labor practice. In any event, even if the hearing examiner erred, the error was cured by subsequent action in the litigation, for the record does contain undisputed evidence of the Company's failure to bargain with the Union during the last six months of the certification year (B.A. 28–34).

CONCLUSION

For the above stated reasons, the petition for certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LAURENCE S. GOLD,
Attorney,
National Labor Relations Board.

JUNE 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964